

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

JACOB S.,

Claimant,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2006030796

DECISION

Gary Brozio, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on June 14, 2006.

Vince Toms, Senior Consumer Services Representative, appeared for the Inland Regional Center (IRC).

Georgia S. and Jacob S., parents, represented their Son, Jacob (Claimant). The parents were assisted by James Mark Manley, MFT, and Lisa Danley, from the Riverside Department of Mental Health. Claimant was not present.

The matter was submitted June 14, 2006.

ISSUE

Does Jacob S. have a developmental disability that qualifies him for regional center services under the Lanterman Act?

FACTUAL FINDINGS

Background

1. Claimant is 15 years old and lives with his parents in Perris, California. He attends high school in a non-public setting and is in the tenth grade. He is one of six children. According to Jacob's mother, one of Jacob's sisters is mentally retarded.

2. Jacob's mother noticed a difference in Jacob's behavior when he was a child. He had problems understanding and following directions. His learning and adaptability were slow. He had mood swings and often became solemn. Around age four, Jacob began receiving mental health services. Jacob's mother testified that the services consisted primarily of medications and some basic counseling; Jacob did not receive meaningful therapy or testing.

3. When Jacob entered Kindergarten, he immediately had trouble keeping up. This continued for the remainder of his schooling. He fell more and more behind his peers.

4. Jacob continues to exhibit several areas of deficiency. At school, Jacob tries but he is easily frustrated and needs constant prompting and redirection. At home, Jacob cannot be trusted to go out on his own. Presently, he is accompanied by a mentor for the entire day. The mentors provide a "safety net" and prevent Jacob from getting into trouble from poor judgment. The mentors try to teach him life skills, safety skills, and ways of dealing with his explosive behavior. Jacob was not adapting well in life. Jacob's mother was very concerned for his well being, and she was especially concerned about Jacob's ability to cope with life in the future.

Mental Retardation or a Similar Condition

5. The issue at the hearing was whether Jacob qualified for regional center services because he was mentally retarded, because he had a condition similar to mental retardation, or because he had a condition that required treatment similar to that of a mentally retarded individual. (Welf. & Inst. Code, § 4512, subd. (a).) The latter two categories are commonly referred to as the "fifth category."

6. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) states that the essential feature of mental retardation is "significantly subaverage general intellectual functioning" in combination with "significant limitations in adaptive functioning" in at least two skill areas. The Lanterman Act, however, requires greater proof of limitations in adaptive functioning than the DSM-IV-TR. The Lanterman Act requires an applicant to show a "substantial disability," which requires proof of at least three "significant functional limitations" in the areas of (1) self-care, (2) receptive and expressive language, (3) learning, (4) mobility, (5) self-direction, (6) capacity for independent living, and (7) economic self sufficiency. (Welf. & Inst. Code, § 4512, subd. (l).) "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded."

(*Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129.) In addition, an applicant seeking to prove eligibility under the fifth category must also show a substantial disability under section 4512, subdivision (l).

Dr. Zimmermann's Testimony

7. The IRC contended that Jacob was not mentally retarded and did not fall within the fifth category. Their case was based upon the expert testimony of staff psychologist Robert Zimmermann, Ph.D. Dr. Zimmermann had been employed at IRC for over three years. He conducted approximately 180 to 200 assessments a year. He was an expert in assessing mental retardation and the fifth category.

8. Dr. Zimmermann reviewed Jacob's school records and former assessments. In November 2004, he personally evaluated Jacob and administered three standardized tests. He wrote a psychological evaluation in which he concluded that Jacob had learning disorders in reading and math, a major depressive disorder (by history), and a conduct disorder. After completing his report, Dr. Zimmermann reviewed the subsequent psychological assessment of Edward J. Ryan, Ph.D., who concluded that Jacob was mildly mentally retarded. Dr. Zimmermann believed that Dr. Ryan's assessment did not provide a reliable analysis of Jacob's condition, and that Jacob was not mentally retarded and did not have a similar condition. The reasons for Dr. Zimmermann's conclusions are discussed below.

Dr. Zimmermann's Document Review

9. The Perris School District prepared numerous Individualized Education Programs (IEP) plans for Jacob. As Dr. Zimmerman noted, none of the IEPs concluded that Jacob was mentally retarded. Rather, the IEPs identified Jacob's disability as an emotional disturbance.

10. The school district also prepared three psychological reports. The first was prepared on 1999 when Jacob was eight years old and in the third grade. Dr. Zimmerman found many aspects of the report significant. The report noted that Jacob's developmental milestones were early, except for speech. Most mentally retarded people evidence delays earlier than age eight. On the Matrix Analogies Test (MAT), which provides a narrow I.Q. assessment, Jacob scored a 97, which is in the average range. The other tests showed scatter. They showed that Jacob had good non-verbal skills and intellectual functioning, but these skills did not translate into good academic achievement in reading, writing, and math. The school district concluded that Jacob has severe learning disabilities. In addition, Jacob frequently misbehaved. At school, he had mood swings and verbally threatened peers and adults. Teachers noted that his emotional and behavioral issues were interfering with his ability to learn. At home, his behavior varied from compliant to yelling, and he once attempted to choke his brother with a belt. The report indicated that Jacob had been referred to Perris Mental Health, but there was no indication that Jacob was mentally retarded. Finally, Jacob was distractible during testing, which undercut the reliability of the tests. All this led Dr. Zimmermann to conclude that, at age eight, Jacob had good non-verbal skills and

intellectual functioning, but that he had extensive mental health needs and a comorbid learning disability.

11. In 2001, the Perris School District produced the second psychological report. Jacob was ten years old and in the fifth grade. The report indicated that Jacob was diagnosed with Attention Deficit Hyperactivity Disorder. The report concluded that Jacob had a high level of depression and maladjustment. Jacob sabotaged all relationships with erratic behavior. The report noted that Jacob had benefited from generalized speech therapy, which would be unusual for a mentally retarded person. Regarding the testing, some of Jacob's scores remained the same but others fell significantly. For example, Jacob's MAT score fell from 97 to 73, which is on the low end of the borderline range. His auditory-sentence-memory score fell from 101 to 67. Dr. Zimmermann believed that Jacob did not "guess" his way to higher scores on the earlier testing. Rather, the variation might have occurred because Jacob was taking serious psychotropic medications, because of his attention deficit disorder, or because of his severe depression and lack of motivation. Dr. Zimmermann continued to believe that Jacob's overall picture, at the age of ten, showed a learning disability rather than mental retardation, but the discrepancies between the 1999 and 2001 tests somewhat undercut the degree of certainty.

12. In 2002, the school district produced a Confidential Assessment Report. Jacob was 12 years old. The report recounted Jacob's continuing problems with violence, aggressive behavior, and rapid mood swings. It revealed that Jacob continued to be heavily medicated, and that he was not responding to mental health counseling. The report also contained vague language suggesting that Jacob might have low intellectual functioning. Dr. Zimmermann continued to believe that Jacob had mental health issues and learning disabilities, but in combination with the discrepancies between the 1999 and 2001 assessments, Dr. Zimmermann concluded that he had to rule out low intellectual functioning through personal testing.

Dr. Zimmermann's Clinical Assessment

13. In November 2004, Dr. Zimmerman tested Jacob in juvenile hall. He administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), the Wide Range Achievement Test, Third Edition (WRAT-III), and the Street Survival Skills Questionnaire (SSSQ). His assessments were made using the DSM-IV.

14. The WISC-IV tested intellectual functioning. The results showed significant scatter. The test showed a wide range of scores in verbal comprehension and working memory. The same was true for the perceptual reasoning and speeded subtests. Consequently, Dr. Zimmermann was not able to calculate an accurate full-scale I.Q. The best he could do was to give a range of intellectual functioning, which he calculated as follows: verbal comprehension (68-81), perceptual reasoning (71-86), working memory (52-67), and processing speed (65-83). These scores meant that, 95 percent of the time, Jacob would function within these ranges. The range scores demonstrated that Jacob had deficient memory skills, and was low in other areas. But he had average intelligence in concepts and matrix reasoning, which matched the results of his 1999 MAT score. These results were not

consistent with mental retardation because mentally retarded people generally score at the same low level across all tests. Still, the WISC-IV was not conclusive, because the low range of the scores could suggest a generalized deficit in intellectual functioning.

15. The WRAT-III tested scholastic achievement. The test demonstrated that Jacob struggled with academic achievement. His highest score was in math where Jacob tested only at the fourth-grade level.

16. The SSSQ tested adaptive functioning. Jacob performed in the average range on this test. He had an average understanding of concepts and health and safety procedures. Although his reading of signs in the community was deficient, he performed in the average range when the signs were read to him. He correctly identified many tools. His knowledge of public services was within normal limits. He was deficient in telling time, and was in the low average range for using currency. Nevertheless, the SSSQ demonstrated that Jacob had good adaptive functioning in the community.

17. After the testing, Dr. Zimmermann concluded that Jacob did not have a global uniform deficit in intellectual functioning. Indeed, some of his intellectual functioning was in the low average to average range. Thus, Jacob was not mentally retarded. He did not suffer from a condition similar to retardation, and he did not require the simplified treatment afforded to mentally retarded individuals. Rather, Jacob had learning disorders, major depression, and a conduct disorder. He was not eligible for regional center services.

Dr. Ryan's Clinical Assessment and Report

18. Dr. Zimmermann's assessment was not the end of the matter because, in March 2005, Dr. Edward J. Ryan, Ph.D., tested Jacob at the behest of the juvenile court. Dr. Ryan's testing was done four months after Dr. Zimmermann's testing, but Jacob's scores on WISC-IV were significantly lower. In the report, Dr. Ryan concluded that Jacob was mildly mentally retarded.

19. Dr. Ryan's report was the only expert-opinion evidence supporting the diagnosis of mild mental retardation. (No expert rendered an opinion that Jacob qualified for regional center services under the fifth category.) There were several reasons why Dr. Ryan's report was not sufficient to prove, by a preponderance of the evidence, that Jacob was mildly mentally retarded. To begin with, Dr. Ryan's diagnosis was based, in large measure, on the intelligence testing (i.e. the WISC-IV scores). But Dr. Ryan did not consider Dr. Zimmermann's testing on the WISC-IV, from a mere four months earlier, showing that Jacob was capable of much higher scores. Neither did Dr. Ryan review the school district's past intelligence testing, which showed some higher intelligence scores on the MAT test. More importantly, Jacob told persons at IRC that he was not in a good mood for Dr. Ryan's testing, which indicated a possible lack of motivation or distractibility on that particular test. This cast substantial doubt on the reliability of Dr. Ryan's intelligence testing, which formed the cornerstone of Dr. Ryan's mental-retardation diagnosis. In addition, Dr. Ryan failed to perform standardized tests or render an opinion regarding adaptive functioning. The DSM-IV required significant impairments in adaptive functioning for a diagnosis of mental

retardation, and Dr. Zimmermann's results on the SSSQ test showed that Jacob had considerable street survival skills. Dr. Ryan's report did not address this necessary prong of the diagnosis for mental retardation. Dr. Ryan also failed to give a convincing differential diagnosis. For example, considerable evidence indicated that Jacob had mental-health problems. Jacob had auditory and visual hallucinations, and numerous psychiatric hospitalizations, which are not a part of a mental-retardation diagnosis. Mental health issues can lower intelligence scores by disrupting concentration and lowering motivation. Dr. Ryan did not address this possibility. He did not address the significance of many of Jacob's symptoms, nor did he render a complete diagnosis explaining all of Jacob's symptoms in a compelling way.

Dr. Zimmermann's Review of Dr. Ryan's Report

20. Dr. Zimmermann later reviewed Dr. Ryan's report. For the reasons stated above, the report did not change Dr. Zimmermann's diagnosis. Dr. Zimmermann recognized that Jacob had significant handicaps, but concluded he was not mentally retarded. He did not have a similar condition to mental retardation, nor did he have a condition requiring similar treatment. Jacob needed mental health services and specialized treatment for his learning disabilities. In fact, a program for mentally retarded people might be detrimental to Jacob because, unlike mentally retarded people, Jacob had certain intellectual strengths that could be used to raise his performance in the areas of deficiency.

LEGAL CONCLUSIONS

The Lanterman Act

1. The Lanterman Developmental Disabilities Services Act (Act) is contained in the Welfare and Institutions Code. (Welf. & Inst. Code, § 4500 et. seq.) The purpose of the Act is to provide a "pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life." (§ 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

Developmental Disability

2. Section 4512, subdivision (a) of the Act defines a developmental disability as follows:

"(a) 'Developmental disability' means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals

with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.”

3. Section 54000 of Title 17 of the California Code of Regulations further defines the term developmental disability:

“(a) ‘Developmental Disability’ means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.”

Burden of Proof

4. In a proceeding to determine eligibility, the burden of proof is on the Claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

The Evidence Was Not Sufficient to Prove That Jacob Had a Developmental Disability

5. This case turns on the lack of credible, expert testimony establishing that Jacob qualified for regional center services because he was mentally retarded, because he had a condition similar to mental retardation, or because he had a condition that required treatment similar to that of a mentally retarded individual. (Welf. & Inst. Code, § 4512, subd. (a).) No expert testified on Jacob's behalf. The only evidence supporting Jacob's position was Dr. Ryan's report.

6. Dr. Ryan's report concluded that Jacob was mildly mentally retarded. The problem with this diagnosis was threefold: (1) Dr. Ryan's intelligence testing was unreliable, (2) Dr. Ryan failed to render an opinion regarding adaptive functioning, and (3) there was no meaningful differential diagnosis. Dr. Ryan did not testify, and consequently, no evidence was presented to explain, ameliorate, or dispel these substantial concerns regarding the diagnosis of mild mental retardation. In addition, Dr. Ryan's report did not render an opinion regarding the fifth category. Thus, there was a failure of proof on this theory.

7. Apart from the lack of evidence, Dr. Zimmermann provided a thoughtful and detailed analysis concerning the nature of Jacob's condition. Especially convincing was Dr. Zimmermann's conclusion that Jacob's cognitive strengths could be used – in conjunction with a specialized learning program – to assist Jacob's development. It must be remembered that Jacob displayed average intelligence on many tests. These strengths could be used to assist Jacob in ways not available to the mentally retarded. Indeed, Dr. Zimmermann concluded that a program designed to address significantly subaverage *general* intellectual functioning might harm Jacob. There was no expert opinion evidence to refute Dr. Zimmermann's conclusions in this regard. In short, Jacob did not meet his burden or proof regarding mental retardation or the fifth category.

8. These conclusions are based on all the Factual findings and Legal Conclusions.

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.

ORDER

The IRC's denial of regional center services is upheld. Claimant failed to demonstrate that he has a developmental disability under the Lanterman Act.

DATED: _____

GARY BROZIO
Administrative Law Judge
Office of Administrative Hearings